

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PAUL FADER	:	DETERMINATION
	:	DTA NO. 819002
for Redetermination of Deficiencies or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Years 1997 through	:	
1999 and for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period March 1, 1999 through August	:	
31, 2000.	:	

Petitioner, Paul Fader, 33-59 Jason Court, Bellmore, New York 11710, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1997 through 1999 and for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1999 through August 31, 2000.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 29, 2003 at 10:30 A.M., with all briefs to be submitted by October 1, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared by Larry Kars, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel).

ISSUES

I. Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to Sunset of Queens Inc. and who willfully failed to do so, thus becoming liable for a penalty equal to such unpaid tax under section 685(g) of the Tax Law.

II. Whether petitioner had sufficient involvement in and control over the activities of Sunset of Queens Inc. so as to be considered a person responsible to collect and remit sales tax on behalf of such corporation pursuant to Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

1. On February 26, 2001, the Division of Taxation (“Division”) issued to petitioner, Paul Fader, six notices of deficiency asserting a deficiency of New York State and New York City withholding taxes as follows:

Notice Number	Period Ended	Amount Due
L-019136125-6	September 30, 1999	\$5,820.20
L-019136126-5	June 30, 1999	\$5,814.33
L-019136127-4	March 31, 1999	\$5,284.88
L-019136128-3	December 31, 1998	\$5,706.78 ¹
L-019136129-2	September 30, 1998	\$5,255.91
L-019136130-2	April 10, 1997 through June 26, 1997	\$2,040.86 ²

Each of the notices explained that the records of the Division indicated that petitioner was an officer or responsible person of Sunset of Queens Inc. (“Sunset”) and that, as a result, he was liable for a penalty equal to the withholding tax not paid by the business.

¹ The penalty amount asserted to be due of \$6,066.49 was reduced by payments or credits of \$359.71 resulting in a balance due of \$5,706.78.

² The total penalty asserted to be due of \$4,939.70 was reduced by payments or credits of \$2,898.84 resulting in a balance due of \$2,040.86.

2. The Division issued three notices of estimated determination to petitioner which assessed sales and use tax as follows:

Assessment Number	Period Ended	Estimated Tax Assessed	Interest	Penalty	Balance Due
L-019136155-6	August 31, 2000	\$19,268.28	\$1,244.13	\$3,082.90	\$23,595.31
L-019136156-5	May 31, 2000	\$19,268.28	\$1,839.50	\$3,660.95	\$24,768.75
L-019136157-4	February 29, 2000	\$12,845.52	\$1,655.68	\$2,825.97	\$17,327.17

Each of the forgoing notices explained that, in accordance with Tax Law § 1131(1); § 1133 and § 1138(a), petitioner was liable as a responsible officer or person for the taxes determined to be due from Sunset.

3. The Division issued two notices of determination to petitioner, dated February 26, 2000, which assessed sales and use taxes as follows:

Assessment Number	Period Ended	Tax	Interest	Penalty	Payments/Credits	Balance Due
L-019136159-2	11/30/99	\$17,487.00	\$2,868.80	\$4,373.88	\$0.00	\$24,729.68
L-019136160-2	05/31/99	\$17,391.33	\$4,060.01	\$5,312.71	\$7,757.37	\$19,006.68

The forgoing notices contained the same explanation as that set forth in the notices of estimated determination.

4. Sunset was a corporation which sold lighting fixtures and related items. It was started by the grandparents of Dana Tepper and Paul Fader and passed on to the succeeding generations. During the periods in issue, three individuals owned the outstanding stock of Sunset: petitioner, who owned 41.4051 percent, Dana Tepper, who owned 43.5949 percent, and Jeffrey Goldberg, who owned the remaining 15.0 percent.³ Mr. Tepper was the president of the corporation while petitioner and Mr. Goldberg were vice-presidents. Collectively, they were regarded by the staff

³ Mr. Goldberg purchased his interest from Mr. Tepper and petitioner.

of Sunset as the bosses. However, Mr. Tepper was referred to by some employees as the “head honcho” whereas petitioner and Mr. Goldberg were characterized as “figureheads” because Mr. Tepper “ran the show.” Each of the officers received the same salary.

5. The officers of Sunset had distinct tasks. Petitioner’s time at Sunset was mainly spent outside of the store working in the warehouse, driving a forklift or making deliveries in a truck. He also performed the tasks of a handyman by repairing items that had broken. Upon receiving Mr. Tepper’s approval, petitioner was authorized to hire drivers for making deliveries. Petitioner interviewed prospective drivers because he was able to determine whether an individual was familiar with the streets. Petitioner did not have access to the corporate books and records.

6. Mr. Goldberg’s duties included checking the prices on the invoices which were sent to customers. He also worked in the department which was involved in shipping and receiving goods. Mr. Goldberg’s responsibilities also involved collecting money from clients who had not paid and dealing with lighting salesmen for the showroom.

7. Mr. Tepper was in charge of the firm’s financial matters and record keeping. The accountant who prepared Sunset’s annual compilation and corporate tax returns regarded Mr. Tepper as his corporate contact. The accountant did not confer with petitioner. Generally, Dana Tepper, as president, signed Sunset’s payroll, sales and corporate tax returns. However, over the years, petitioner may have signed a tax return.

8. Only Mr. Tepper had the authority to prepare or permit the preparation of a check for taxes. The checks for taxes were made out manually by Mr. Tepper or he would direct a bookkeeper to draft the check. Usually, the checks were signed by Mr. Tepper and one of the other officers. In or about August or September 2000, an agent of the Division visited Sunset

and spoke to Mr. Teppper. The agent did not discuss matters with anyone else in the office including petitioner.

9. Dana Teppper's mother, Shirley Teppper, was the head bookkeeper at Sunset. In this position, she provided information to a company known as Paychex which prepared the payroll checks. Payroll checks required two signatures and Shirley Teppper was almost always one of the signatories. The other signatory would be either Dana Teppper, Jeff Goldberg or petitioner. Petitioner would only be asked to sign a check if the other principals were not available.

10. The accounts payable department, which was managed by Shirley Teppper, was in charge of preparing checks for the firm's suppliers. Only Mr. Teppper and his mother knew the password to the computer which was used to prepare checks for suppliers. It would have been impossible for petitioner to draft a check because he did not know where the checkbook was kept and he did not know the computer password. Ms. Teppper would only draft a check when directed to do so by Mr. Teppper.

11. Mr. Teppper had two offices, an executive office and a front office. Upon receipt, the mail was deposited on Mr. Teppper's desk in the front office. Thereafter, Mr. Teppper took the invoices to the accounts payable department and the checks to the accounts receivable department. No one opened the mail before Mr. Teppper. If Mr. Teppper was not in, the mail would stay on his desk until he returned. Mr. Teppper placed the notices at issue in this matter on the back desk of the executive office.

12. Dana Teppper was not forthcoming about Sunset's financial difficulties. As a result, petitioner was not aware when the lighting manufacturers were not being paid. Each time petitioner asked Mr. Teppper how the business was doing, Mr. Teppper replied that everything was fine. On one occasion, Mr. Teppper became angry at one of the bookkeepers because she gave petitioner financial information.

13. In or about July 2000, petitioner's paycheck was dishonored because of insufficient funds. Petitioner asked Mr. Teppner about this and was told that he would receive payment any day. Subsequently, petitioner was issued a paycheck but he was instructed not to cash it. As far as petitioner knew, everyone was getting paid except for himself, Mr. Teppner and Mr. Goldberg.

14. Petitioner's wife called Mr. Teppner and was told that any existing problems were being resolved. Mr. Teppner mentioned that he had hired an attorney, but he would not provide the name of the attorney. After being told by his wife about the conversation, petitioner went into Mr. Teppner's office in order to obtain the name of the attorney. Mr. Teppner refused to reveal the name of the attorney ostensibly because he did not want to get petitioner involved. A physical confrontation ensued and petitioner had to be pulled off of Mr. Teppner. Petitioner did not receive an answer to his question.

15. Sunset maintained a bank account at The Chase Manhattan Bank. On December 12, 2000, the Division seized the account. Petitioner first became aware that Sunset was having problems with its taxes when the seizure occurred. Thereafter, a meeting was held at the office of Dana Teppner's attorney and documents were made available to petitioner and his wife. The documents provided included canceled checks and tax returns. Upon reviewing these documents, petitioner learned that his signature had been forged on some checks.

16. Approximately one month before Sunset was closed by New York State, petitioner noticed paperwork from another business, known as Manhattan Electric, concerning customers of Sunset. Petitioner inquired why paperwork from Manhattan Electric was present. Mr. Teppner replied that Sunset did not have the material requested by the customer so Sunset was billing it through Manhattan Electric. The explanation did not make sense to petitioner and he concluded that Mr. Teppner was taking customer orders over the telephone, calling Manhattan Electric, which was providing the material, and then having Sunset deliver the material with an invoice

from Manhattan Electric. Mr. Tepper told petitioner that Manhattan Electric was doing Sunset a favor by keeping the accounts “alive.” Petitioner could not stop this practice. As a result, certain large customer accounts went to Manhattan Electric where Mr. Tepper subsequently went to work when Sunset closed.

17. At the hearing, petitioner was presented with a series of checks payable to Shirley Tepper which were endorsed by Dana Tepper and Shirley Tepper. The accountant for Sunset had never seen the checks before and petitioner had no idea why the checks were drafted.

18. After Sunset closed, petitioner and his attorney requested copies of Sunset mail which was sent to Mr. Tepper. This request was not honored.

19. Mr. Goldberg commenced a lawsuit against Mr. Tepper and petitioner seeking damages and other relief arising from the loss of his investment due to Sunset’s failure to pay sales and withholding taxes. Thereafter, petitioner filed a cross-claim against Mr. Tepper.

20. Prior to the time Sunset closed, petitioner trusted Mr. Tepper to do his job. Sunset had been a family business for 100 years with ownership passing from generation to generation. Mr. Tepper had a college degree in business and petitioner had an associate degree from a community college. Petitioner did not wish to compete with Mr. Tepper who wanted things done his way.

21. In accordance with New York State Administrative Procedure Act § 307(1), petitioner’s proposed findings of fact have been substantially accepted and incorporated into this determination. Proposed findings of fact 5, 7, 8, 9, 10, 15, 18, 19 and 40 were modified to reflect the record. Proposed findings of fact 16, 17, 28, 29, 41 and 42 were rejected as irrelevant.

CONCLUSIONS OF LAW

A. The issue presented is petitioner’s possible liability for unpaid sales and use taxes, as well, as his potential liability for unpaid withholding taxes owed by Sunset. With regard to sales

and use taxes, Tax Law § 1133(a) states that “Every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. . . .” Tax Law § 1131(1), in turn, defines “persons required to collect tax” and a “person required to collect any tax imposed by this article [Article 28]” to include any officer or employee of a corporation who, as such officer or employee, is “under a duty to act for such corporation . . . in complying with any requirement of [Article 28].”

B. The holding of corporate office does not automatically impose tax liability upon an office holder (*Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed*, 69 NY2d 822, 513 NYS2d 1027; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427). Rather, the resolution of whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564). In each case, the question presented is whether a person had or could have had sufficient authority or control over the affairs of the corporation to be regarded as a responsible officer or employee (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990). The Commissioner's regulations examine whether the person is authorized to sign the corporation's tax returns, is in charge of maintaining corporate records, or is responsible for managing the corporation (20 NYCRR 526.11[b][2]). In *Matter of Goodfriend* (Tax Appeals Tribunal, January 15, 1997) the Tribunal summarized the pertinent factors as follows:

Factors to consider when determining responsible officer status under Article 28 are the authorization to hire and fire employees (*Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed*, 69 NY2d 822, 513 NYS2d 1027); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation (*Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862; *Matter of Stern*, Tax Appeals Tribunal, September 1, 1988); the duties and functions of the officers and directors as outlined in the certificate of incorporation, corporate bylaws and minutes of

corporate meetings, and the preparation and filing of sales tax forms and returns (*Vogel v. New York State Dept. of Taxation & Fin., supra*); the individual's economic interest in the corporation and whether he had authority to sign tax returns for the corporation (*Matter of Martin v. Commissioner of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239); the payment, including the authorization to write checks on behalf of the corporation, of creditors other than the State of New York and the United States (*Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427). Another factor is the individual's simultaneous status as an officer, director and shareholder (*Matter of Cohen v. State Tax Commn., supra*); and in a closely-held corporation, as in the present matter, the individual's knowledge of the affairs of the firm and the firm's profits (*Vogel v. New York State Dept. of Taxation & Fin., supra*; *Matter of Blodnick v. New York State Tax Commn., supra*).

C. With regard to the withholding tax penalty asserted against petitioner, Tax Law

§ 685(g) provides:

Willful failure to collect or pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payments thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Tax Law § 685(n), in turn, furnishes the following definition of “person” subject to the section 685(g) penalty:

[T]he term person includes an individual . . . or an officer or employee of any corporation . . . , who as such officer, [or] employee . . . is under a duty to perform the act in respect of which the violation occurs.

D. The question of whether someone is a “person” under a duty to collect and pay over withholding taxes is a factual one, similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes (*Matter of Hopper v. Commr. of Taxation and Finance*, 224 AD2d 733, 637 NYS2d 494, *lv denied* 88 NY2d 808, 647 NYS2d 713). The relevant factors to consider include: whether the taxpayer signed or had the authority to sign tax returns, owned stock or served as an officer or employee of the corporation, derived a substantial portion of income from the company, possessed a financial interest in the company,

possessed the right to hire and fire employees or had authority to pay the corporate obligations (*Matter of Capoccia v. New York State Tax Commn.*, 105 AD2d 528, 481 NYS2d 476; *Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272; *Matter of Shah*, Tax Appeals Tribunal, February 25, 1999). The issue to be resolved in each case is “whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee” (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

E. With respect to withholding tax, and unlike the sales and use tax situation, if petitioner is held to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. Merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is “willful” within the meaning of that term as used in Tax Law § 685(g). In *Matter of Levin v. Gallman* (42 NY2d 32, 396 NYS2d 623), the Court employed the following test for willfulness:

[w]hether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (citations omitted; *id.*, 396 NYS2d at 624-625).

Finally, “corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it for someone else to discharge” (*Matter of Ragonese v. State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301).

F. In essence, petitioner’s argument is that he either did not have sufficient authority to be regarded as a responsible officer or that he was prevented from exercising his authority by Mr. Tepper. In order to prevail, petitioner must “establish by clear and convincing evidence that he

was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own (citations omitted)” (*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998).

G. As the Division has pointed out, there are factors present in this case which support the conclusion that petitioner was responsible for the sales and use taxes due from Sunset. Petitioner was an officer and significant shareholder of the corporation. He earned the same salary as the other officers and had check signing authority. On occasion, petitioner exercised the authority to sign checks.

H. Nevertheless, the weight of the evidence supports the conclusion that petitioner did not have sufficient authority or control over the corporation to be regarded as a responsible officer for the sales and use taxes or withholding taxes due from the corporation. The record shows that petitioner did not have access to the corporate books and records and that Mr. Teppner maintained strict control over disbursements. Only Mr. Teppner and his mother knew the password to the computer which was used to prepare checks to suppliers. He decided who was to be paid and when they were to be paid. Mr. Teppner was the only individual who could have prepared a check for taxes or authorized another individual to prepare a check for taxes. Mr. Teppner’s exclusive authority in the area of taxes was demonstrated by the fact that when an agent for New York State visited Sunset in August or September 2000 he only spoke to Mr. Teppner. Under the circumstances, petitioner did not have and could not have had sufficient authority and control over the affairs of the corporation to be found to be a responsible officer (*see, Matter of Harshad Shah*, Tax Appeals Tribunal, February 25, 1999).

I. Petitioner is also correct that the element of willfulness is absent. The record shows that when petitioner’s paycheck was dishonored, he went to Mr. Teppner for an explanation.

Thereafter, Mr. Tepper led petitioner to believe that all creditors were being paid except for himself and the other shareholders. Petitioner was further led to believe that money would be coming in from certain accounts and that, when it did, he would be paid. It is significant that these statements were made in the context of a corporation which had been successfully operating for three generations. Under the circumstances, petitioner's testimony that he was not aware that there were tax problems until Sunset's bank account was seized is credible and establishes a lack of willfulness under the test established in *Matter of Levin v. Gallman (supra)*. It is concluded that this is not a situation where a corporate officer chose not to pay attention to whether tax obligations were being met (*see e.g., Matter of Hooper v. Commr. of Taxation and Finance*, 224 AD2d 733, 637 NYS2d 494, 497, *lv denied* 88 NY2d 808, 647 NYS2d 713, *reargument denied*, 88 NY2d 1065, 651 NY2d 409).

J. The petition of Paul Fader is granted and the notices of deficiency, notices of estimated determination and notices of determination are canceled.

DATED: Troy, New York
March 11, 2004

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE